IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1945.

No. 1068
Criminal.

MEYER EASTMAN, Alias "MEYER ESSTMAN",
and DAVE MARGLOUS,
Petitioners,

vs.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI

To the United States Circuit Court of Appeals
For the Eighth Circuit

and

BRIEF IN SUPPORT THEREOF.

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To the United States Circuit Court of Appeals for the Eighth Circuit.

To the Honorable Chief Justice and the Associate Justices of the Supreme Court of the United States:

Come now Meyer Esstman and Dave Marglous, petitioners, and respectfully petition this Honorable Court to grant a writ of certiorari to the United States Circuit Court of Appeals for the Eighth Circuit, and respectfully show to this Honorable Court as follows:

SUMMARY STATEMENT OF MATTER INVOLVED.

The problem presented here is whether petitioners were properly convicted of a crime under Section 3 (c) of the Federal Alcohol Administration Act, 49 Stat. 978, Title 27 U. S. C. App., Section 203 (c) (1).

This case involves the construction and application of that section, which reads as follows:

> "(c) It shall be unlawful, except pursuant to a basic permit issued under this chapter by the Secretary of the Treasury—
>
> "(1) to engage in the business of purchasing for resale at wholesale distilled spirits, wine, or malt beverages;"[1]

Petitioners and one Jake Hendin were jointly indicted on September 15, 1944, the indictment containing 14 counts (R. 15-36). The fourteenth count charged that on or about June 7, 1943 petitioners and Jake Hendin, as co-partners and employees, doing business as Peoples Liquor Store, wilfully and knowingly engaged in the business of purchasing distilled spirits for "resale at wholesale" in that petitioners and Hendin engaged in the business, and not in pursuance to a basic permit, of purchasing distilled spirits for resale in wholesale quantities to retail liquor dealers who purchased said distilled spirits for the purpose of sale and thereafter did sell such spirits so purchased from petitioners (R. 35-36).

The first thirteen counts of the indictment charged the petitioners and Hendin with knowingly, willfully and feloniously making false entries on Treasury Department Form 52b (R. 15-35).

At the close of the Government's case the petitioners moved for a directed vedict on each count of the indictment, but this motion was overruled as to Count 14. Thereupon petitioners declined to offer any evidence (R. 47). By direction of the Court, petitioners and Hendin were acquitted on the first thirteen counts; the jury found all defendants guilty on the fourteenth count (R. 11). Appeals were duly taken by petitioners and Hendin to the

[1] Title 27, Code of Federal Regulations, Sec. 1.1, defines "resale at wholesale" as meaning a sale to any trade buyer. A trade buyer is any person who is a wholesaler or retailer. Title 27, U. S. C. App., Sec. 211.

Circuit Court of Appeals for the Eighth Circuit on January 10, 1945 (R. 1, 5). On January 16, 1946, the Circuit Court of Appeals affirmed the judgment of conviction as to petitioners and reversed the judgment as to Hendin (R. 325). A petition for rehearing was duly filed on January 31, 1946 (R. 351). This petition was overruled by the Court on March 4, 1946 (R. 353).

The evidence offered by the Government which the Circuit Court of Appeals held sufficient to prove that petitioners violated the statute as charged in the indictment is as follows:

Petitioners are partners who own a retail liquor business in St. Louis, operating under the name Peoples Liquor Store (R. 62). They purchased a wholesale liquor dealer's stamp to enable the firm to sell distilled spirits in any quantity in excess of five wine gallons (R. 63). No retail liquor dealer may validly sell liquor in such quantities without obtaining such a stamp. The store in question conducted a rather extensive retail business on principal thoroughfares of the City of St. Louis, Missouri, employing some 7 to 9 clerks (R. 202). All sales, irrespective of the quantity involved, are made on the premises of the store and the purchaser takes possession at the store, no deliveries being made. The purchasers make their own arrangements for hauling the liquor from the store (R. 151). Each month, in compliance with the Internal Revenue Code and regulations, petitioner Esstman executed and filed a report of all sales made by the store in excess of five wine gallons, the reports showing the dates of the sales, the amount and description of the items purchased, and the names and addresses of the purchasers as given to the clerks (R. 65, 69, 75, 77, 83, 87).

The Government introduced direct evidence concerning only two sales made at petitioners' store. One was to Fannie Gladdish, who purchased 12 cases of whiskey on

July 7, 1943. She testified that she was the manager of a tavern and the holder of a liquor license, and that after the purchase was made she had personally taken the liquor from the premises of the Peoples Liquor Store to the stockroom of her tavern (R. 194, 198). Her dealings were with one of the clerks in the store (R. 197, 202), but there was no evidence by the witness or anyone else that the clerk or the petitioners had any knowledge that Fannie Gladdish was a liquor dealer or that she intended to resell the liquor. The report of the sale made by petitioners contained the witness' correct home address, which was not that of the tavern (R. 196, 202).

The other sale, concerning which testimony was adduced, was to a P. H. Clark in June, 1943. A witness, P. H. Carlisle, testified with respect to this sale. He accompanied a man named Sanders to the petitioners' store and Sanders carried on the sales transaction. Sanders did not testify, and Carlisle stated he did not hear what was said. A purchase of one hundred cases of liquor was made at this time (R. 231). Carlisle testified that at the date of the trial (which was December 19, 1944), he operated a tavern in Joplin, Missouri (R. 219). There was no evidence as to whether Carlisle was a liquor dealer at the time the purchase was made or as to whether Carlisle intended to resell the liquor or what his purpose was with respect thereto. There was no evidence that petitioners or any of their clerks knew that Carlisle was not Clark, the name given by him, or that Carlisle intended to resell any liquor, if such was his intention.

Monthly reports required to be filed by the holder of a wholesale liquor dealer's tax stamp concerning sales of liquor in excess of five wine gallons covering the period of eight months from April to November, 1943, inclusive, was offered in evidence by the Government (R. 108, 65, 67, 69, 75, 77, 83, 87). These reports disclosed a total of 37 sales, the number varying from month to month. There were no

reports of any sales at all of this amount for the three consecutive months of August, September and October, 1943. Of the 37 sales, 20 were of less than 10 cases each, 7 were sales of from 10 to 25 cases each, and 10 were sales of 50 or more cases (6 of the 10 being 100 or more cases each).

Other than the testimony given with respect to the Gladdish and Clark transactions, there was no evidence of the circumstances surrounding any of the sales reported by petitioners nor was there any evidence of the occupation or purpose of the purchasers. There was evidence that ten of the purchasers could not be found or their purchases verified, but there was no evidence that the petitioners knowingly falsified their records or knew that any name or address on the reports was incorrect. In this connection the trial court directed a verdict of acquittal with respect to falsifying the records (R. 253, 268).

There was no evidence offered by the Government to show the fact that, or the time when, petitioners purchased any distilled spirits for sale at their store for any purpose. It was conceded that the petitioners did not hold a basic permit, their position being that no permit was necessary in view of the nature of their operations.

The trial court in its charge to the jury quoted the indictment and the statute, and stated the issue for determination by the jury, as follows:

> "The issue, boiled down, is the charge by the government that they (petitioners) sold intoxicating liquors at wholesale for resale purposes, and that charge is denied by the defendants" (R. 264-266).

The Circuit Court of Appeals for the Eighth Circuit held that 1) proof of the sale to Fannie Gladdish, 2) the testimony of Carlisle concerning his purchase, and 3) evidence of the other large volume sales as shown on petitioners' monthly reports justified the conclusion that peti-

tioners sold to dealers; that because the quantities reported as sold were greatly in excess of "normal individual consumption requirements" and some of the purchasers could not be located the following year, the jury was justified in concluding that petitioners knew the purchasers were dealers and knowingly made sales to trade buyers; and hence that petitioners were engaged in purchasing their liquor for sale to trade buyers in violation of the statute.

JURISDICTION.

Jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925 [28 U. S. C., Section 347 (a)] and Title 18 U. S. C., Section 688, and Rule 11 of the Criminal Rules promulgated pursuant thereto.

The judgment and opinion of the Circuit Court of Appeals sought to be reviewed was entered January 16, 1946 (R. 325). A petition for rehearing was duly filed January 31, 1946 (R. 351), which was denied on March 4, 1946 (R. 353). This petition for writ of certiorari is filed within the period provided therefor under the rules of this Court.

THE QUESTIONS PRESENTED.

1. Is proof of sales of liquor in quantities in excess of "normal individual consumption requirements" sufficient to sustain a conviction for engaging in the business of purchasing liquor for resale at wholesale where there is no evidence as to when petitioners purchased liquor or that they had any knowledge of the occupation and intent of any of their customers and no evidence is offered to show the actual occupation and intent of any except a single customer?

2. May the Act properly be construed as prohibiting sales of liquor in quantities in excess of what an Appellate Court deems "normal individual consumption requirements" unless the dealer sustains the burden of proving that such sales are made to others than trade buyers? Is such a standard of guilt too vague, indefinite and uncertain to chart a course of conduct, particularly where no person has advance notice thereof or of the meaning of such a standard? Does such a construction of the Act authorize a conviction to rest upon surmise, speculation and suspicion?

3. May a conviction for engaging in the business of purchasing distilled spirits for resale at wholesale be sustained where there is no evidence that petitioners purchased any distilled spirits for any purpose whatever or that they purchased any within the period of limitations, as well as a lack of evidence that petitioners at any time purchased any distilled spirits for other than retail purposes?

4. In order to sustain a conviction for engaging in the business of purchasing distilled spirits for resale at wholesale in violation of Section 203 (c) of the Federal Alcohol Administration Act, is it permissible:

(a) To infer from the fact alone that a retail liquor dealer lawfully makes sales pursuant to his wholesale liquor dealer's stamp, in quantities in excess of what an appellate court deems to be "normal individual consumption requirements," that the purchasers are trade buyers, and

(b) Upon the basis of such assumption further infer from the same fact of lawful quantity sales that the retail liquor dealer knew the purchasers were actually trade buyers, and

(c) Upon the basis of the assumption that the retail liquor dealer knew he was selling to trade buyers further infer that the liquor so sold was originally purchased by him for the purpose of resale to trade buyers?

Does the drawing of inference upon inference and basing one presumption upon another result in a conviction which is based upon speculation, surmise, suspicion and conjecture?

5. Was the evidence sufficient to support the jury's determination that petitioners violated the Act where the proof consists only of evidence showing:

(a) That petitioners operated a large retail store and had purchased a wholesale liquor dealer's stamp;

(b) That a clerk in petitioners' store made a single sale of twelve cases of liquor to a purchaser who held a liquor license, but was not known to petitioners or their clerk to be a dealer;

(c) That over a period of eight months a total of 37 sales were made at petitioners' store of liquor in various quantities in excess of five wine gallons each as authorized by their wholesale stamp;

and there is no evidence that petitioners or their clerks

knew or had reason to believe that any purchaser was a trade buyer or that petitioners would knowingly have sold to trade buyers?

6. Does Section 203 (c) of the Federal Alcohol Administration Act require a basic permit of a retail liquor dealer who does not receive, sell, offer or deliver for sale, contract to sell, or ship any distilled spirits in interstate or foreign commerce, in order that such dealer after purchasing a wholesale liquor dealer's stamp may validly sell liquor in intrastate commerce in quantities in excess of "normal individual consumption requirements"?

7. Is there any substantial evidence to support the conviction of petitioner Dave Marglous?

8. Is there any substantial evidence to support the conviction of petitioner Meyer Esstman?

9. In a prosecution for knowingly and willfully engaging in the business of purchasing liquor for resale to liquor dealers in violation of Section 203 (c) of the Federal Alcohol Administration Act, is the charge to the jury proper, fair and adequate where it merely quotes the indictment and statute involved and states that the issue for determination is whether petitioners sold to trade buyers?

REASONS RELIED ON FOR ALLOWANCE OF WRIT.

I.

The Circuit Court of Appeals for the Eighth Circuit has in effect construed Section 203 (c) (1) of the Federal Alcohol Administration Act as prohibiting a retail liquor dealer who has purchased a wholesale liquor dealer's stamp from making sales of liquor in quantities in excess of what the Court deems "normal individual consumption requirements" unless the dealer sustains the burden of proving to the satisfaction of the Court and the jury that those who purchase from him are not in fact trade buyers. The Court has thus decided an important question of Federal law involving the construction and application of the Federal Alcohol Administration Act which has not been but should be decided by this Court.

The evidence showed only that one sale of twelve cases of liquor was made to a trade buyer who was not known to petitioners to be such, and that other sales were made in quantities found by the Circuit Court of Appeals to be in excess of "normal individual consumption requirements." These sales, in the absence of an explanation by petitioners, were held of themselves sufficient to prove that the purchasers were trade buyers known by petitioners to be such. There was no evidence at all of any purchases of liquor made by petitioners.

The importance of the decision in this case extends far beyond the petitioners who are immediately involved. It directly affects every retail liquor dealer who, having obtained a wholesale liquor dealer's stamp, makes sales in quantities authorized by such stamp. As the Act is construed by the Circuit Court of Appeals an intolerable burden is placed upon such retail liquor dealers. They can-

not now conduct their business without peril of prosecution and conviction against which they cannot effectively protect themselves except by abandoning sales pursuant to their wholesale tax stamp.

The Act prohibits a person who has no basic permit from engaging in the business of purchasing distilled spirits for resale at wholesale. By regulation the words "resale at wholesale" are defined as meaning sales to trade buyers. No regulation makes the quantity sold a factor to any extent whatever. The Circuit Court of Appeals, however, has made the quantity sold the determining factor by setting up as the standard "normal individual consumption requirements." This is a standard which is previously unknown to the law and so vague and indefinite that a liquor dealer must guess as to its meaning and application.

There is no departmental regulation which puts the dealer on notice that quantity sales are in themselves improper or unlawful, or which imposes a duty on the dealer of investigating and determining at his peril the identity, occupation and purpose of his customers. Yet the Circuit Court of Appeals in effect requires the dealer to conduct such an investigation and be subject to conviction if he makes no investigation, or if his investigation in the opinion of the Court or jury is not sufficiently thorough.

Petitioners submit that there is urgent need of an authoritative and elucidating decision by this Court construing Section 203 (c) of the Act in its application to retail liquor dealers.

II.

The decision of the Circuit Court of Appeals for the Eighth Circuit that the evidence was sufficient to support the conviction of petitioners is in conflict with the decision of the Circuit Court of Appeals for the First Circuit in the

case of **Supreme Malt Products Co. v. United States**, 153 Fed. (2d) 5, decided January 15, 1946. The First Circuit held that evidence that a retail dealer in the course of its business of making sales pursuant to its wholesale stamp made a sale of liquor to a dealer with actual knowledge that the liquor was to be resold is insufficient to warrant a conviction under the Act, in the absence of other circumstances from which the jury could find that the defendant either intended to sell or had sold liquor at wholesale to a buyer intending to resell the same in other instances.

III.

The decision of the Circuit Court of Appeals for the Eighth Circuit that evidence to the effect that petitioners made sales in quantities in excess of "normal individual consumption requirements" is sufficient to support a conviction for engaging in the business of purchasing liquor with intent to resell the same to trade buyers is in conflict with applicable decisions of this Court holding that no one should be required to guess as to the acts and conduct constituting the crime and that a reasonably ascertainable standard of guilt must be prescribed. Such cases are:

Connally v. General Construction Co., 269 U. S. 385;
International Harvester Co. v. Kentucky, 234 U. S. 216;
Weeds, Inc., v. United States, 255 U. S. 109;
United States v. L. Cohen Grocery Co., 255 U. S. 81;
Cline v. Frink Dairy Co., 274 U. S. 445;
Lanzetta v. New Jersey, 306 U. S. 451;
Herndon v. Lowry, 301 U. S. 242;
Stromberg v. California, 283 U. S. 359.

Such decision is also in conflict with the applicable decisions of this Court in **M. Kraus & Bros., Inc., v. United**

States, decided March 25, 1946; **United States v. Resnick**, 299 U. S. 207; and **United States v. Wiltberger**, 5 Wheat. 76, holding that no conduct is criminal unless it is plainly within the statute, and that there are no constructive court-made offenses.

IV.

The decision of the Circuit Court of Appeals for the Eighth Circuit that the jury could infer from the fact of quantity sales that the purchasers were trade buyers, and upon that presumption and the fact that some purchasers could not be found, further infer that petitioners knew the purchasers were actually trade buyers, and upon the basis of both such presumptions further infer that the liquor sold was purchased by defendants with the intent to sell the same to trade buyers is in conflict with the applicable decision of this Court in **United States v. Ross**, 92 U. S. 281, which holds that inferences from inferences and presumptions resting on the basis of another presumption are not permissible.

Such decision is also in conflict with the applicable decisions of this Court in **Bollenbach v. United States**, 326 U. S. —, 66 S. Ct. 402; **Tot v. United States**, 319 U. S. 463; **United States v. Falcone**, 311 U. S. 205; and **Direct Sales, Inc., v. United States**, 319 U. S. 703.

The presumptions in this case are unreasonable, and there is no logical connection based upon common knowledge, reason, and experience between the proven facts and the inferred facts. Petitioners were required by the Circuit Court of Appeals to explain transactions which had no incriminating tendencies. Petitioners could legally sell in any quantity. Substantial quantities of liquor are often purchased by others than trade buyers. It is an everyday occurrence for liquor dealers to sell extremely large quantities to purchasers who use the same for weddings,

engagement parties, and debuts, as well as for holiday gifts. Other purchasers make unusually large purchases to provide against possible liquor shortage. The fact that some purchasers could not later be found is not of itself material, since petitioners made no deliveries and recorded the names and addresses furnished by the purchasers to the clerks making the sales. Petitioners did not knowingly record an incorrect name or address and there is no duty imposed upon them by statute or regulation requiring any investigation.

V.

The decision of the Circuit Court of Appeals for the Eighth Circuit that the charge to the jury was fair and adequate is in conflict with the applicable decision of this Court in **Screws v. United States**, 325 U. S. 91, which holds that even in the absence of any exception it is the duty of the trial court to fairly submit the essential ingredients of the offense. The trial court merely quoted the indictment and the statute, and then stated the issue as follows (without further guide, clarification or explanation or even submitting to the jury the inferences which the Circuit Court of Appeals held "permissible"):

> "Now, gentlemen, that statute in substance provides, that is, the language just referred to and quoted:
>
> > " 'To engage in the business of purchasing for resale at wholesale intoxicating liquors,'
>
> means the purchasing for resale at wholesale to purchasers who make the purchase for the purpose of selling intoxicating liquor. There is apparently no issue in this case, or claim that they have a basic permit. There is no dispute about the fact that they had the right, under their wholesale liquor dealer's permit, to sell intoxicating liquors in excess of five

> gallons. The issue, boiled down, is the charge by the Government that they sold intoxicating liquors at wholesale for resale purposes, and that charge is denied by the defendants."

And this was the entire instruction of the Court on the subject matter of the offense charged (R. 265, 266).

The trial court thus ruled in effect as a matter of law that if the jury found such sales, then petitioners were conclusively presumed to have purchased the liquor for sale to trade buyers and hence to have violated the statute.

The decision of the Circuit Court of Appeals approving the charge of the trial court is also in conflict with the applicable decisions of this Court in **M. Kraus & Bros., Inc., v. United States**, decided March 25, 1946, and **Bollenbach v. United States**, 326 U. S. —, 66 S. Ct. 402, which hold that the trial court has the duty to give the jury proper guidance by a lucid statement of the relevant legal criteria, and that a conviction ought not to rest on an equivocal direction to the jury on a basic issue.

PRAYER.

Wherefore your petitioners respectfully pray that a writ of certiorari issue under the seal of this Court directed to the United States Circuit Court of Appeals for the Eighth Circuit commanding said Court to certify to this Court a full and complete transcript of the record and proceedings of the said Circuit Court of Appeals for the Eighth Circuit had in the case numbered and entitled on its docket cause No. 13032, Criminal, Meyer Eastman, alias "Meyer Esstman," and Dave Marglous, Appellants, v. United States of America, Appellee, to the end that the

judgment and decision of said Circuit Court of Appeals in the within described cause may be reviewed by this Court as provided by law, and that the judgment herein of said Circuit Court of Appeals for the Eighth Circuit be reversed by this Court, and for such further relief as to this Court may seem proper.

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BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

OPINION OF COURT BELOW.

The opinion of the Court of Appeals appears at pages 316 to 325 of the Record and is not yet reported.

JURISDICTION OF THIS COURT.

The grounds upon which the jurisdiction of this Court is invoked are stated on page 6 of the petition for writ of certiorari.

STATEMENT OF THE CASE.

A statement of the case appears in the petition for writ of certiorari and the same is hereby adopted and made a part of this brief.

SPECIFICATION OF ERRORS TO BE URGED.

The Circuit Court of Appeals erred

(1) in holding that the evidence was sufficient to sustain the conviction of petitioner Dave Marglous;

(2) in holding that the evidence was sufficient to sustain the conviction of petitioner Meyer Esstman;

(3) in holding that the evidence was sufficient to establish guilty knowledge and intent upon the part of the petitioners;

(4) in failing to construe the Act to require substantial proof that petitioners were engaged in purchasing distilled spirits with intent to sell the same to trade buyers;

(5) in construing the Act as prohibiting large volume sales to customers unless the dealer proves them to be consumers;

(6) in sustaining the convictions on the basis of inferences drawn from inferences and presumptions resting upon other presumptions;

(7) in setting up a standard of conduct for the liquor dealer which is so vague, indefinite, and uncertain as to furnish no adequate guide;

(8) in constructing a crime from conduct not included in the language of the Act, or reasonably covered by statute or regulation;

(9) in construing the Act to include retail liquor dealers whose operations are wholly intrastate;

(10) in holding that the instructions clearly and fairly presented the case to the jury.

ARGUMENT.

I.

The Act Does Not Require Retail Liquor Dealers to Obtain a Basic Permit.

It is important that this Court authoritatively construe Section 203 (c) (1) of the Federal Alcohol Administration Act which requires a basic permit as a condition for engaging in the true wholesale liquor business.

Every retail dealer who desires to sell liquor in quantities in excess of five wine gallons must obtain a wholesale liquor dealer's stamp and pay the excise therefor.[1] Such dealer does not thereby become a wholesaler except for the limited purposes of the Internal Revenue Code and is not thereby subject to the provisions of the Federal Alcohol Administration Act.[2] The Internal Revenue Code places no limit upon the quantities the dealer who has purchased such a stamp may sell at any one time or to any one person, nor does the Code prohibit sales to any particular class of persons.[3]

The Federal Alcohol Administration Act requires a permit only of one whose business it is to purchase liquor with the intent to resell such liquor at wholesale. The permit provisions have no application to retailers as such. The latter is not required to obtain a permit and in fact cannot obtain one. There is no excise or other tax imposed in connection with a wholesaler's basic permit, and the Government derives no revenue therefrom. Hence, no evasion of taxes is involved in this case.

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[1] Section 3250, I. R. C. (a) (3).

[2] Report of Ways and Means Committee, 74th Congress, 1st Session, House Report No. 1542, page 16. "Wholesaler as used in the bill, outside the taxing provisions of Section 1 (which were eliminated before enactment), means a wholesaler in accordance with the usual trade understanding and not as defined in the Internal Revenue laws for tax purposes."

[3] Section 3254, I. R. C.

II.

The Act Does Not Prohibit or Regulate Quantity Sales and May Not Properly Be Construed to Make Such Sales Unlawful.

The word "wholesale" has different meanings in different situations. Generally it means sales of goods in gross to dealers who sell to consumers. **Great Atlantic & Pacific Tea Co. v. Cream of Wheat Co.**, 227 Fed. 46, 47-48. Under the Internal Revenue Code the meaning of "wholesale" is dependent upon the quantity sold. Whether the Secretary might validly have promulgated a regulation under the Act defining "wholesale" as meaning sales in excess of specified quantities need not be decided because **he did not do so.** The "controlling regulation" of the Federal Alcohol Administration (quoted by the Circuit Court of Appeals, R. 317) defines "resale at wholesale" as meaning a "sale to any trade buyer." A trade buyer is a retailer or wholesaler.

Thus, as clarified by the regulation in effect at the time in question in 1943 (and still in effect), the Act requires a permit only of those persons who purchase liquor with the intent to sell the same to trade buyers. Dealers were, therefore, put on notice that unless a permit were in effect they could not legally **purchase** liquor with the intention of ultimately selling that liquor to other dealers. They were, however, given no notice or warning that sales of liquor in any particular (or unspecified) quantities were prohibited or even affected by the Act.

What the Circuit Court of Appeals in effect did is what the Secretary did not do, namely, declare that sales in quantity were presumptively knowingly made to dealers.

The crux of this case is that petitioners (through their clerks) made several sales in quantity and that some of the purchasers could not later be found by the Government. The Circuit Court of Appeals held as a matter of

law that the quantities so sold were in excess of "normal individual consumption requirements"; and that in the absence of explanation it may be inferred not only that the purchasers were dealers but that petitioners knew that they were dealers, and hence that petitioners originally purchased the liquor for sale to dealers. The Court did not indicate what explanation was required of petitioners, and certainly if an explanation were made a jury would not be required to believe it. Hence, so far as the meaning and application of the Act as construed by the Circuit Court of Appeals is concerned, it can make no difference whether or not an explanation is offered.

There is concededly no evidence in the record that petitioners knew that the quantity buyers were dealers, if in fact they were, or that petitioners intended to sell to known trade buyers. The Circuit Court of Appeals held in effect, however, that such knowledge and intention were proved by the fact that petitioners made sales in quantities "in excess of normal individual consumption requirements" even though the sales themselves were legal. All of the inferences and presumptions upon the basis of which the convictions were affirmed rest upon the conclusion of the Circuit Court of Appeals that the quantities sold were in excess of "normal individual consumption requirements."

The Secretary has not promulgated any regulation which warns the dealer as to what quantities he may safely sell. Nor has any regulation been promulgated which requires a liquor dealer to sell at his peril or which imposes upon him a duty of investigating the business and purpose of his customer or of the name and address furnished by such customer to him. For a regulation which does furnish a guide to a retail dealer under another statute, see **United Cigar Stores Whelan Corp. v. United States**, 113 Fed. (2d) 340.

In the instant case it is the Circuit Court of Appeals which ex post facto lays down the rule that if a purchaser

cannot be found and the quantity is in excess of "normal individual consumption requirements," then irrespective of whether there is any circumstance to show that petitioners knew the purchasers were dealers, if they were, the jury may properly find that petitioners were engaged in the business of purchasing liquor with the intention of selling the same to trade buyers.

In view of the large number of retail liquor dealers who have purchased wholesale tax stamps authorizing sales in quantity, it is submitted that there is urgent necessity for a ruling by this Court as to the meaning and application of Section 203 (c) (1) of the Act. Retail liquor dealers cannot possibly engage in their normal business operations if they must guess as to what constitutes "normal individual consumption requirements." This is all the more true with respect to those dealers who, like petitioners, make all their sales on the store premises and do not deliver any merchandise and whose record of the sales contains the names and addresses of the buyers as given to the clerks making the sales. Surely if Congress intended to prohibit volume sales or sales pursuant to a wholesale tax stamp, unless a permit is first obtained, language was readily available to express such thought. Yet the Circuit Court of Appeals in effect held that one is engaged in the business of purchasing distilled spirits for the purpose of sale to dealers, if the evidence shows sales of liquor in larger than "normal" quantities. Such decision can mean only that the Act prohibits a person from engaging in the business of making occasional sales of liquor in quantities in excess of "normal individual consumption requirements" unless the dealer can conclusively show that the purchasers were not in fact trade buyers.

III.

The Decision of the Circuit Court of Appeals Conflicts With Decisions of This Court.

a) **The decision broadens the statute beyond the fair meaning of the language used.**

This construction of the statute is not only unjust because of the absence of any prior warning or notice to petitioners as to what a dealer can or cannot do, but is also unreasonable and a violation of due process. In the first place, the Court, in effect, has made the doing of a lawful act, to-wit, sales of liquor in quantities authorized by their wholesale tax stamp, a crime although such conduct is not made a crime by the language of the Act or fairly inferred therefrom.

The Act merely denounces the business of "purchasing" liquor for specified purposes. There was no evidence that petitioners made any purchases or that they intended to sell to trade buyers. The Circuit Court of Appeals, therefore, made that a crime which is not made a crime by the Act of Congress.

In **United States v. Wiltberger,** 5 Wheat. 76, 95, 96, this Court stated:

> "It is the legislature, not the court, which is to define a crime, and ordain its punishment. * * * To determine that a case is within the intention of a statute, its language must authorize us to say so."

In **United States v. Resnick,** 299 U. S. 207, this Court held as follows:

> "Statutes creating crimes are to be strictly construed in favor of the accused; they may not be held to extend to cases not covered by the words used. * * * Before one may be punished, it must appear that his case is plainly within the statute; there are no constructive offenses."

The Act here involved was not intended to apply to businesses such as that of petitioners, whose operations both with respect to purchases and sales are wholly intrastate in character. To construe the Act as the Circuit Court of Appeals has done, to include such businesses, raises serious constitutional objections and is inconsistent with the intent of Congress.[1]

By making intrastate sales the controlling factor, rather than purchases made with the intent to sell to dealers, the Circuit Court of Appeals has completely overlooked the clear intent of Congress. Subsection (c) of Section 203 of the Act is divided into two subparagraphs. The first subparagraph, under which petitioners were indicted, involves one of the two elements of the true wholesale business, namely, the purchase of the liquor for the purpose and with the intent of selling to trade buyers. The second subparagraph involves the other element of the true wholesale business, namely, the sale of liquor. However, the only sales which are affected by the Act are those made by a person engaged in the business of purchasing for resale at wholesale, and then only that portion of sales as are made in interstate or foreign commerce of liquor which was initially purchased for resale at wholesale.

The Circuit Court of Appeals has construed the Act to prohibit sales in intrastate commerce of liquor not shown by the evidence to have been purchased for resale to trade buyers, irrespective of whether the seller is engaged in the business defined in subparagraph 1.

This decision clearly conflicts with the applicable decisions of this Court holding that a statute may not be enlarged beyond the fair meaning of the language used.

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1 Report of Ways and Means Committee, 74th Congress, 1st Session, House Report 1542, page 6. ". . . No permits are provided for brewers or retailers. . . . No permit authority is required for sale or other disposition in intrastate commerce or for warehousing, except in connection with bottling of distilled spirits." See also Hearings before the Committee on Ways and Means, 74th Congress, 1st Session, House Report 8539, page 26.

b) **The Circuit Court of Appeals has set up a standard of conduct too vague and indefinite to afford due process of law.**

Moreover, the uncertain standard thus set up by the Court leads to conjecture and surmise as to what conduct comes within the scope of the Act. There is no such guide known to the law as "normal individual consumption requirements" with respect to the purchase of liquor. The dealer is required to guess as to what quantity he may sell before the inference is to be drawn that the purchaser is a trade buyer.

This Court has recently ruled that the same rule must apply to administrative regulations as is applied to statutes defining criminal action, namely, that the provisions must be explicit and unambiguous and must adequately inform those who are subject to their terms what conduct is prohibited in order that the ordinary person can know in advance how to avoid an unlawful course of action. **M. Kraus & Bros., Inc., v. United States**, decided March 25, 1946. Other cases holding not consonant with due process of law standards of conduct so vague that men of common intelligence must necessarily guess as to their meaning are: **Connolly v. General Construction Co.**, 269 U. S. 385; **Lanzetta v. New Jersey**, 306 U. S. 451; **Cline v. Frink Dairy Co.**, 274 U. S. 445; **International Harvester Co. v. Kentucky**, 234 U. S. 216, and **Weeds, Inc., v. U. S.**, 255 U. S. 109. The same rule obviously should govern a judge-made standard of conduct.

c) **The Circuit Court of Appeals has drawn inferences from inferences and based presumptions upon presumptions in order to sustain convictions.**

Petitioners respectfully submit that if a conviction for engaging in the business of purchasing liquor for resale at wholesale may rest upon evidence which shows no more

than several quantity sales and that several purchasers could not later be found, and there is no evidence that petitioners knew that any purchaser was a trade buyer or had given an incorrect name or address, or that petitioners intended to sell to trade buyers or that petitioners had made any purchases of liquor with such intent, then such conviction is based entirely on suspicion, conjecture and surmise without any substantial evidence.

The presumptions of guilty knowledge and intent which the Circuit Court of Appeals drew from the fact of quantity sales and the fact that some of the purchasers could not later be found are not supported by logic or the common experience of mankind. The inferences drawn in the present case are more unreasonable and illogical than the statutory presumption which was found unsupportable in **Tot v. United States**, 319 U. S. 463, and the judge-made presumption involved in **Bollenbach v. United States**, 326 U. S. —, 66 S. Ct. 402. The **Tot** case held that possession of a firearm coupled with conviction for a prior crime was not evidence proving that such firearm was shipped or transported in interstate commerce. The **Bollenbach** case held that possession of stolen property in another state other than that in which it was stolen shortly after the theft cannot properly raise the presumption that the possessor transported the property in interstate commerce. The applicable rule is stated as follows in the **Tot** case:

> "There must be some logical connection or relationship based upon common knowledge, reason and experience between the proven fact or facts and the inferred or presumptive fact. If such connection does not exist, it follows obviously that a defendant is exposed to conviction upon evidence which has no probative value; or, put in another way, upon no evidence at all."

In the instant case, the circumstances relied upon by the

court below are entirely without incriminating tendency or effect. Quantity sales are lawful when made by the holder of a Wholesale Tax Stamp.[1] Large purchases by persons other than trade buyers are not unusual and are made quite frequently. The fact that a few purchasers could not be found is no evidence whatever of guilt. Petitioners did not knowingly record an incorrect name and address, and it is significant that the only purchaser shown to have been a trade dealer (Fannie Gladdish) was properly recorded on petitioners' records. Petitioners, of course, had no knowledge that she was a trade buyer.

The fact that the case is based upon circumstantial evidence does not obviate the necessity of proving and not presuming the circumstances. See **United States v. Ross**, 92 U. S. 281, which holds that inferences from inferences or presumptions resting on the basis of another presumption are not permissible. In the **Ross** case this Court held as follows:

> "Whenever circumstantial evidence is relied upon to prove a fact, the circumstances must be proved, and not themselves presumed. . . . A presumption which the jury is to make is not a circumstance in proof, and it is not, therefore, a legitimate foundation for a presumption."

This Court should say whether the statute is reasonably susceptible to the construction placed upon it by the Circuit Court of Appeals and whether, as held by that Court, inference may rest upon inference and presumption upon presumption to sustain a conviction under the Act.

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[1] Government witness Deputy Collector of Internal Revenue Hope testified as follows:

"Q. A person that pays the fee to the United States Government, what is he permitted to do under that application? A. He is permitted to sell liquor in quantity.
Q. What quantities? A. Any amount in excess of five gallons.
Q. A hundred cases? A. Yes, sir; a thousand cases if he wants to" (R. 247).

IV.

The Charge to the Jury Was Wholly Inadequate and Affirmatively Misleading.

A person charged with a crime cannot be said to have had a fair trial unless the jury is fully informed with respect to the elements of the offense charged and is apprised of all the essential facts which they must find from the evidence before a verdict of guilty may be returned. Due process means more than that the jury hear the evidence and then evolve some theory therefrom upon which to find the defendant guilty.

In this case the trial court quoted from the indictment and the statute under which petitioners were charged, stated the "issue boiled down" and then did no more than to inform the jury of the burden of proof and other cautionary instructions. The charge in the present case was worse than no instruction at all because it affirmatively permitted the jury to wander and meander at will through the evidence and to base their verdict on suspicion alone. It will be noted that the various inferences and "permissible" presumptions which the Circuit Court of Appeals held were proper for the jury to draw were not submitted to the jury by the trial court. All that the jury were told with respect to the issues in the case is contained in the one sentence which purported to state the basic issue. This was stated by the trial court as follows:

> "The issue, boiled down, is the charge by the Government that they (petitioners) sold intoxicating liquors at wholesale for resale purposes, and that charge is denied by the defendants" (R. 266).

Thus it is apparent that the trial court authorized the

jury to convict the petitioners solely upon the basis of a sale to a trade buyer or buyers, whether or not there was an intention on the part of petitioners to sell to trade buyers and whether or not petitioners knew the purchasers were trade buyers. That this erroneous conception of the law was the Government's trial theory is shown by the argument of the Government's attorney.[1] Moreover, the instruction in effect informed the jury as a matter of law that if they found that sales were made to trade buyers, the petitioners were engaged in the business of purchasing liquor for sale to trade buyers. Thus, so far as the jury were informed, the inference which the Circuit Court of Appeals held "permissible" was made mandatory.

In **Bollenbach v. United States,** 326 U. S. —, 66 S. Ct. 402, it is said:

> "A conviction ought not to rest upon an equivocal direction to the jury on a basic issue."

In the recent case of **M. Kraus & Bros., Inc., v. United States**, decided March 25, 1946, this Court again held to the same effect. In the latter case there was a correct statement of the facts necessary to be found by the jury in the charge, as well as the equivocal direction. The Court held that the correct statements were so intertwined with the incorrect charge as to negative their effect.

In the present case there is no correct instruction to the jury in so far as concerns the elements necessary to be found by the jury to authorize a conviction. There is only the incorrect statement as to the issue for the jury's determination. It is true that the petitioners' exception to

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1 "I think, with respect to that transaction (Fannie Gladdish), that we have proved it (the charge) as much as it could be proven. They are charged with the unlawful selling of liquor for the purpose of resale, and we have shown that Fannie Gladdish bought it for purpose of sale, and put it in her stock" (R. 263).

the charge was a general one, but surely an error of such grave character cannot be waived by the general nature of the exception. A person charged with a crime cannot properly be held to have had a fair trial unless the issues for the determination of the jury are adequately and clearly presented to the jury, whether or not a request for a proper instruction is made.

In the case of **Screws v. United States**, 325 U. S. 91, this Court stated that even where no exception at all is taken to the charge, "where the error is so fundamental as not to submit to the jury the essential ingredients of the only offense on which the conviction could rest, * * * it is necessary to take note of it" on the Court's own motion.

The Circuit Court of Appeals did not base its decision upon the insufficiency of the exception. The Court held that the instruction "clearly and fairly presented the case to the jury" (R. 322). Petitioners submit that this charge not only misstates the basic issue, but furnished no guide whatever to enable the jury to understand the law as it bore upon the facts of the case. There is an entire want of "a lucid statement of the relevant legal criteria." **Bollenbach v. United States**, supra.

CONCLUSION.

This case involves important questions of federal law with respect to the meaning, scope and application of the Federal Alcohol Administration Act. It further involves important questions concerning the reasonableness of presumptions and inferences drawn from lawful conduct in order to affirm convictions not sustained by the evidence. It also involves the important question whether petitioners have been accorded a fair trial under instructions, which not only fail to inform the jury of the essentials of the offense charged, but affirmatively mislead the jury. For

the reasons set forth in the petition and brief, it is submitted that a writ of certiorari should be granted.

Respectfully submitted,

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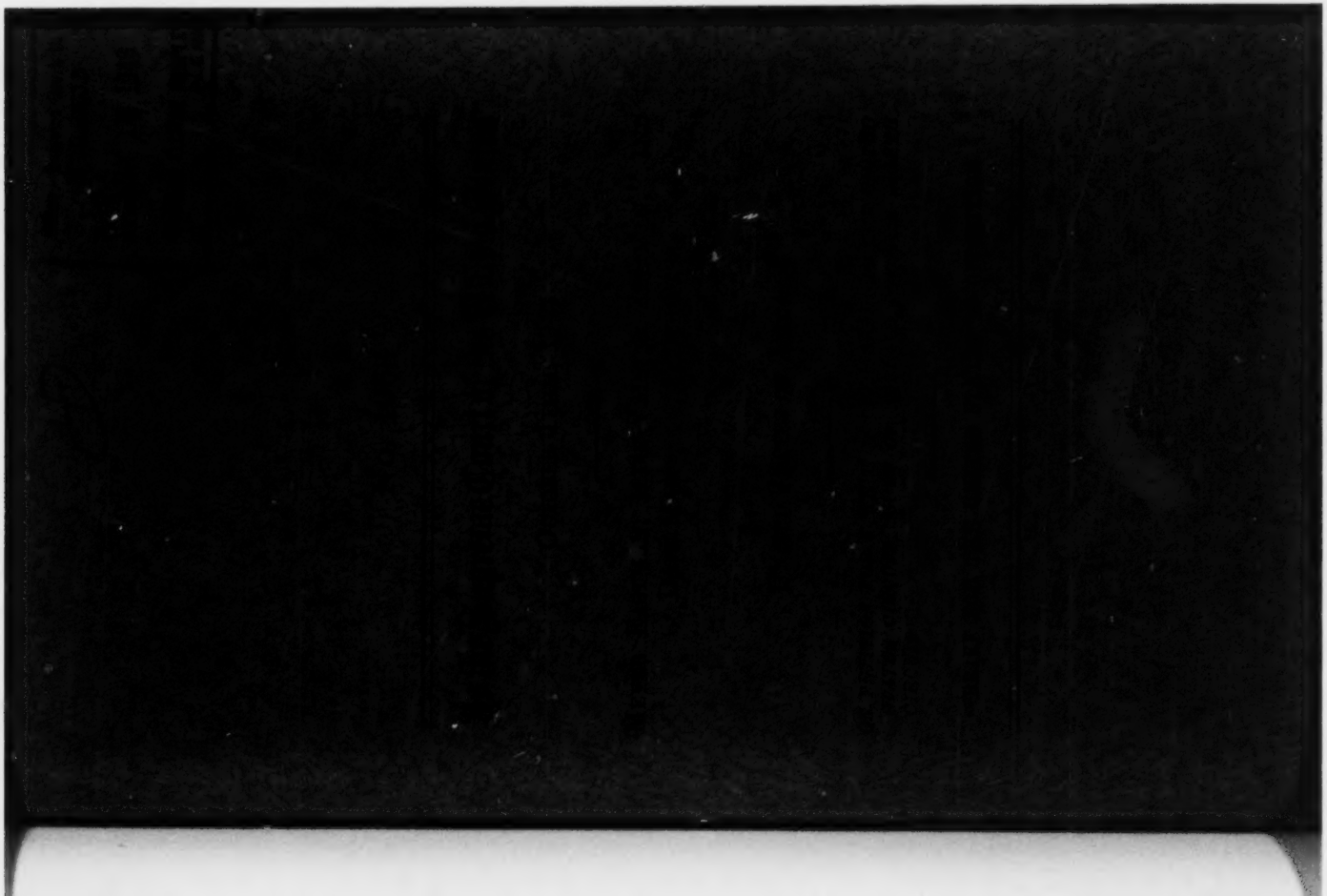

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CITATIONS

693001—46——1

In the Supreme Court of the United States

OCTOBER TERM, 1945

No. 1068

MEYER EASTMAN, ALIAS "MEYER ESSTMAN," AND DAVE MARGLOUS, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the circuit court of appeals (R. 315–325, 353) has not yet been reported.

JURISDICTION

The judgment of the circuit court of appeals was entered January 16, 1946 (R. 325–326), and an order amending the opinion and denying a motion for rehearing (R. 327–351) was entered March 4, 1946 (R. 353). The petition for a writ of certiorari was filed April 6, 1946. The juris-

diction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTIONS PRESENTED

1. Whether evidence that petitioners, without having obtained a basic permit as required by Section 3 (c) (1) of the Federal Alcohol Administration Act, made numerous purchases and resales of large quantities of distilled spirits to two persons shown to be trade buyers and to several others who could not be located, and that petitioners were admittedly indifferent to the character of the businesses carried on by their customers and to the use that such customers made of the distilled spirits involved, was sufficient to support the verdict of the jury that (a) petitioners were engaged in the business of purchasing distilled spirits for "resale at wholesale,"[1] and (b) petitioners acted with such intent as the statute requires.

2. Whether the trial judge's charge to the jury was an adequate statement of the law and the issues involved.

3. Whether the applicable provisions of the Federal Alcohol Administration Act and the regulations promulgated thereunder are so vague, in-

[1] The regulations promulgated by the Federal Alcohol Administration define the term "resale at wholesale" to mean "a sale to any trade buyer," *infra*, p. 20.

definite, and uncertain as to render them legally ineffective.

4. Whether the prohibition in the Act against engaging in the business of purchasing distilled spirits for resale at wholesale without a basic permit applies to businesses exclusively intrastate in character.

STATUTES AND REGULATIONS INVOLVED

The pertinent portions of the Federal Alcohol Administration Act, the regulations promulgated thereunder by the Federal Alcohol Administration, and the Internal Revenue Code are set forth in the Appendix, *infra*, pp. 19–20.

STATEMENT

Petitioners and one Hendin were jointly indicted in the District Court for the Eastern District of Missouri. The first thirteen counts of the indictment charged that they knowingly and wilfully made false entries in certain records kept and filed by them pursuant to regulations promulgated by the Secretary of the Treasury under Section 2857 (a) of the Internal Revenue Code, and the fourteenth count alleged that they unlawfully, wilfully, and knowingly engaged in the business of purchasing distilled spirits for resale at wholesale without having the basic permit required by Section 3 (c) (1) of the Federal Alcohol Administration Act (*infra*, pp. 19–20). (R. 15–36.) The court directed a verdict of acquittal as to all the de-

fendants on the first thirteen counts, but they were found guilty on the fourteenth (R. 48–49). Petitioner Eastman was fined $1,000 plus costs, and petitioner Marglous and Hendin were fined $1,000 each (R. 49–53). On appeal to the Circuit Court of Appeals for the Eighth Circuit, petitioners' convictions were affirmed, but Hendin's was reversed (R. 325).

The evidence for the Government, which was not contradicted, shows the following:

During the period involved here, petitioners owned and operated a liquor establishment in St. Louis, Missouri, under the name "Peoples Liquor Store" (R. 62; Gov. Ex. 9, R. 241, 243; Gov. Ex. 10, R. 241, 245). They had purchased the tax stamp required by Section 3250 (a) (3) of the Internal Revenue Code (*infra*, p. 20) of retailers who in a single transaction sell in quantities of five wine gallons or more (R. 63, 241). Petitioners had not, however, applied for or acquired the basic permit required by Section 3 (c) (1) of the Federal Alcohol Administration Act without which they could not lawfully engage in the business of buying liquor for resale at wholesale (R. 114, 126, 136, 150).

While a large portion of petitioners' business may have been at retail in small quantities, the evidence showed that petitioners made at least thirteen sales of liquor in five different months of 1943 in amounts ranging up to 152

cases [2] in a single sale.[3] Of the thirteen sales, ten were to persons who could not be found at the addresses given in petitioners' reports or in the neighborhoods and who were unknown in the communities.[4] One of these ten persons, Meyer Marcus, was ultimately located elsewhere and at the

[2] On the average, 1 case of liquor equals 3 wine gallons (see, e. g., Gov. Ex. 1, R. 93, 65).

[3] Reports filed by petitioners with the Alcohol Tax Unit of the Treasury Department showed the following large sales by petitioners:

April 27, 1943—25 cases of whiskey to Joe Kratz, 1410 Lemay Ferry Rd., Lemay, Mo.;

April 28, 1943—15 cases of whiskey to Joe Goettleib, 1410 Lemay Ferry Rd., Lemay, Mo. (Gov. Ex. 1, R. 93, 65);

May 10, 1943—21 cases of whiskey to Joe Goettleib, 3033 LaSalle, St. Louis, Mo.;

May 12, 1943—20 cases of whiskey to Meyer Marcus, 4064 Lindell, St. Louis, Mo.;

May 19, 1943—5 cases of whiskey to J. W. Deans, Ozark, Mo. (Gov. Ex. 2, R. 95, 69);

June 5, 1943—100 cases of whiskey to Robert Mitchell, 2902 Dickson, St. Louis, Mo.;

June 7, 1943—100 cases of whiskey to P. H. Clark, Joplin, Mo.;

June 15, 1943—75 cases of gin to Fred Clayton, 2016 Main St., Kansas City, Mo. (Gov. Ex. 3A, R. 97–98, 75);

July 6, 1943—145 cases of whiskey and 25 cases of gin to Henry Clark, Monett, Mo.;

July 6, 1943—65 cases of whiskey and 10 cases of gin to Henry Leach, Van Buren, Mo.;

July 7, 1943—12 cases of whiskey to Fannie Gladdish, 2020 Cole, St. Louis, Mo. (Gov. Ex. 4A, R. 102, 104, 83);

November 11, 1943—152 cases of whiskey to George Hoerstfield, Eureka, Mo.;

November 12, 1943—60 cases of whiskey to Henry Jameson, Potosi, Mo. (Gov. Ex. 5, R. 107, 87).

[4] Joe Kratz, R. 119–121, 129; Joe Goettleib, R. 120–122, 129–130, 160–161; Meyer Marcus, R. 122, 130–131; J. W.

trial he denied that he had made the purchase of 20 cases attributed to him by petitioners (see note 3, p. 5, *supra*), although he admitted he had on several occasions purchased a couple of pints at petitioners' place of business (R. 152–153). Of the remaining three purchasers, one, Robert Mitchell, testified to the same effect as Marcus (R. 167–173). The other two purchasers, Fannie Gladish and P. H. Carlisle, confirmed the sales listed to them. Gladish received 12 cases on July 7, 1943, for resale at a tavern operated under license to, and managed by, her but which she stated was owned by another (R. 193–203; Gov. Ex. 7, R. 204, 205). Carlisle testified that he operated[5] a tavern at Joplin, Missouri, and had gone with one Sanders to petitioners' store on June 7, 1943, and that by pre-arrangement Sanders at that time bought 100 cases for him (R. 219–235.)[6]

Contrary to petitioners' claim that "there was no evidence offered by the Government to show

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Deans, R. 131, 162–163, 165–167; Fred Clayton, R. 176–177, 182–184; Henry Clark, R. 132; Henry Leach, R. 122–123, 132–133, 189–193; George Hoerstfield, R. 123–124, 133; Henry Jameson, R. 124–125, 133, 215–218.

[5] Carlisle was not asked whether he operated this tavern as of the time of the purchase in question, but since he was not cross-examined on this matter, the jury could have inferred that he meant he operated the tavern at that time (cf. Pet. 4).

[6] Carlisle testified that he gave the name P. H. Clark to Sanders (R. 234), and the sale was so listed in petitioners' report (Gov. Ex. 3A, R. 97–98, 75).

the fact that, or the time when, petitioners purchased any distilled spirits at their store for any purpose" (Pet. 5; see also pp. 7, 23), reports filed by petitioners with the Alcohol Tax Unit [7] showed as to six of the eleven large sales described in footnote 3, p. 5, *supra,* that petitioners had purchased and received the liquor involved on the same day or but a few days prior to resale by them.[8]

ARGUMENT

1. Petitioners' principal contention is that there was insufficient evidence to warrant the jury in

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[7] These reports, required by regulations of the Secretary of the Treasury promulgated under Section 2857 (a) of the Internal Revenue Code were of three types, only two of which are relevant to the instant discussion: Form 52B, the monthly report of liquor dispositions, and Form 52A, the monthly report of liquor received. The Government introduced in evidence Form 52B filed by petitioners for the months of April, May, June, July, and November 1943. However, Form 52A for only the months of June and July 1943 were introduced. Both forms gave, as required, the names of the purchasers (52B) or sellers (52A), the dates of disposition (52B) or receipt (52A), and the serial numbers of the cases involved.

[8] These purchases and sales by petitioner were as follows:

Number of cases	Date received	Date sold	Purchaser
100	June 5, 1943	June 5, 1943	Mitchell.
100	June 5, 1943	June 7, 1943	P. H. Clark.
75	June 13, 1943	June 15, 1943	Clayton.
(Gov. Ex. 3, R. 98, 73; Gov. Ex. 3A, R. 98, 75)			
28	July 6, 1943	July 6, 1943	Henry Clark.
73	July 6, 1943	July 6, 1943	Leach.
12	July 7, 1943	July 7, 1943	Gladish.
(Gov. Ex. 4, R. 102-103, 81; Gov. Ex. 4A, R. 104, 83)			

finding (a) that they were engaged in the business of purchasing liquor for resale at wholesale,[9] or (b) that they had any criminal intent.

(a) Petitioners argue, first, that Section 3 (c) (1) of the Federal Alcohol Administration Act (*infra*, p. 20) applies only to the business of purchasing for resale at wholesale and that there was no evidence as to purchases by them (Pet. 7–8, 13, 17, 23); and, second, that they could not be said to be "engaged in [such] business" on the basis of the proof adduced (Pet. 8, 11–12, 25–26).

First. As pointed out in the Statement, *supra*, p. 7, the Government introduced unequivocal evidence—reports made to the Treasury Department by petitioners themselves—showing that in at least six instances petitioners had purchased liquor later illegally resold at wholesale, and, moreover, that these purchases were consummated on the same, or a few days immediately preceding, the days on which the illegal resales were made. The only question open on the issue of purchase by the petitioners was whether those purchases were made as part of a business to resell at wholesale. On this question, we believe the circuit court of appeals correctly held that (R. 320–321):

> While the statute prohibits a liquor dealer who is not the holder of a basic

[9] "Resale at wholesale" is defined in regulations promulgated under the Federal Alcohol Administration Act as "a sale to any trade buyer" (*infra*, p. 20).

> permit from engaging in the business of purchasing liquor for resale at wholesale, proof that such a dealer is engaged in selling liquor to trade buyers is evidence that the liquor sold was purchased by him for that purpose. Such a dealer can hardly be heard to say that, while he sells liquor for resale [*sic*] at wholesale, he buys his liquor only for retail purposes. The character of his business, both as to the selling and buying of liquor, must necessarily depend upon the persons to whom he sells and the purpose for which they buy the liquor from him. Any different conclusion would virtually nullify the effectiveness of the statute.

The speciousness of petitioners' argument is further emphasized by the coincidence in time of many of the purchases and resales.

Second. While the foregoing discussion partially answers the argument of the petitioners that they were not "engaged in the business" charged, they urge (Pet. 11–12) that there was proof of only one sale to a trade buyer (Gladdish) and that such proof is insufficient to warrant a conclusion that they were "engaged in the business" of reselling to trade buyers, citing *Supreme Malt Products Co.* v. *United States,* 153 F. 2d 5 (C. A. A. 1). In that case, however, there was proof of only one isolated sale and no proof of corroborating circumstances supporting the conclusion that the defendant was engaged in a

course of business of purchasing for resale to trade buyers. In the instant case, on the other hand, there was proof of an additional sale to a trade buyer, Carlisle, and evidence of a number of sales in large quantities to persons who could not be traced through petitioners' records of such sales. There was also evidence of sales to two persons, Marcus and Mitchell, who denied that they had made any such purchases (see pp. 5–6, *supra*). In addition, there was evidence that petitioners were completely indifferent to the purposes for which their customers purchased liquor in the large quantities shown in their reports (R. 125; see note 10, p. 12, *infra*). It is settled, as the *Supreme Malt Products* decision recognizes (see 153 F. 2d at 6–7), that even a single sale, if thus corroborated, will support a conviction of engaging in a prohibited business without having paid the special tax or having secured a basic permit. See also *Wilson* v. *United States,* 149 F. 2d 780, 781 (C. C. A. 6), certiorari denied October 15, 1945, No. 345 at the present Term, and cases cited.

(b) In connection with their claim that there was insufficient evidence of intent to sell at wholesale or, as wholesale is defined in the regulations under the Act, to trade buyers, petitioners assert that the circuit court of appeals imposed an improper and indefinite test of responsibility by holding, in effect, "that such knowledge and inten-

tion were proved by the fact that petitioners made sale in quantities 'in excess of normal individual consumption requirements' " (Pet. 21).

The issue as to intent might well have been resolved, as suggested by the circuit court of appeals (R. 321), by reference to the principle applicable under regulatory statutes such as the one involved here (Section 7 of the Act, *infra*, p. 20), defining misdemeanors *malum prohibition* and not *malum in se*, that "the law imputes intent from the doing of the act denounced." *Armour Packing Co.* v. *United States*, 209 U. S. 56, 85–86; *United States* v. *Balint*, 258 U. S. 250, 251–252; *United States* v. *Gallant*, 177 Fed. 281 (W. D. Mich.). Under such statutes the conventional requirements for criminal intent are dispensed with and a duty of circumspection to avoid violation is imposed upon persons standing in a responsible position in relation to the public interest protected by the statute. *United States* v. *Dotterweich*, 320 U. S. 277, 281; *United States* v. *Balint*, *supra*, at 253–254.

However, petitioners have had the benefit of a more liberal rule, since their intent to resell to trade buyers was affirmatively established, and it is unnecessary to rely on any theory of constructive intent. Petitioners in fact sold to two persons who were trade buyers; they made numerous other sales of large quantities in excess of normal individual consumption requirements; they admittedly made no attempt to ascertain the intentions or occu-

pations of their large scale customers; and, in general, they evidenced complete and irresponsible indifference to whether their customers were trade buyers or whether they bought under their correct names and addresses.[10] From these cumulative facts, the jury could and apparently did find that petitioners wilfully violated the Act. The quantities of liquor involved in individual transactions were not the sole factor. Such sales should, however, have placed petitioners on notice that the purchasers might be buying for resale, thereby imposing upon them a duty to use reasonable diligence to ascertain the true identity and purposes of the buyers. Their indifference to this duty marks their conduct as wilful. *United States* v. *Thomson*, 12 Fed. 245, 248 (D. Ore.).

Petitioners also urge that no "regulation [has] been promulgated which requires a liquor dealer to sell at his peril or which imposes upon him a duty of investigating the business and purpose of his customer or the name and address furnished by such customer to him" (Pet. 21). Ap-

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[10] An investigator of the Alcohol Tax Unit testified without contradiction (R. 125):

"* * * I asked Mr. Eastman how—I first asked him if he knew these various customers and he said he knew some of them and some he didn't and I reminded him of his lack of a basic permit and asked him what steps he took to determine who they were or whether they were in the liquor business or not and he shrugged his shoulder and said 'I am no detective' and that he took the name and address they gave him but he made no attempt to find out anything about them."

parently petitioners believe that a liquor dealer can gain immunity from the regulatory features of the Act and avoid the necessity of securing a basic permit by merely shutting his eyes to the nature of the business carried on by those who deal with him. Certainly no such position can be maintained, in view of the design of the statute "to regulate the evils which are inseparable from unregulated and unrestricted traffic in intoxicating liquors, [by means of] the regulatory device of license or permits." *Arrow Distilleries* v. *Alexander,* 109 F. 2d 397, 401–402 (C. C. A. 7). The statute would be self-defeating if it did not implicitly require reasonable diligence on the part of unlicensed liquor dealers to avoid selling to trade buyers. And therefore a calculated failure, such as petitioners', to exercise that diligence where circumstances require it, is tantamount to wilful disregard of the statutory requirements.

2. Petitioners claim (Pet. 9, 14–15, 28–30) that the trial judge's charge permitted the jury erroneously to find petitioners guilty without regard to their intent, cf. p. 11, *supra.* The trial judge first read to the jury the statutory provisions which petitioners were charged with violating (R. 264–265), and then read the substance of count 14, including that part charging wilfulness (R. 265). The judge then stated that the "issue boiled down" to the question whether peti-

tioners sold at wholesale for resale purposes (R. 266), but followed this with clear instructions that the burden of proof was on the Government (R. 266) and that petitioners were entitled to acquittal if there was reasonable doubt of their guilt (R. 266). He then properly charged the jury with respect to the meaning of the words "wilfully" and "knowingly" as employed in the indictment (R. 267–268).[11]

Petitioners' contention is predicated upon isolated consideration of that part of the charge in which the judge stated that the issue, "boiled down," was whether petitioners sold at wholesale for resale. Such piecemeal consideration of a court's instructions to the jury is unwarranted. See, e. g., *Boyd* v. *United States,* 271 U. S. 104, 107; *Martin* v. *United States,* 100 F. 2d 490, 497 (C. C. A. 10), certiorari denied, 306 U. S. 649; *Hargreaves* v. *United States,* 75 F. 2d 68, 73 (C. C. A. 9), certiorari denied, 295 U. S. 759. In clear terms, both before and after the portion of the charge which petitioners now argue is objectionable, the court instructed the jury correctly on the elements of intent.

It is therefore evident that the entire charge gave the jury an accurate statement of the ap-

[11] The judge defined these two words as follows (R. 267–268):

"The word 'knowingly', gentlemen, as used in the indictment, means that state of mind where the defendant was in possession of facts from which he knew, or was aware that he could not legally do the act whereof he stands charged.

" 'Wilfully' means intentionally, and not accidentally."

plicable law. But even if there were some doubt as to this, petitioners are precluded from raising the question now, since they made no specific objection when the charge was given. After the trial judge had finished instructing the jury, counsel for petitioners took a general exception to the charge on the ground that it did not correctly state the law. When asked by the court whether there was "anything further," counsel replied in the negative. (R. 268.) It is well settled that it is incumbent upon counsel to direct the attention of the court to the particular portions of the charge to which objection is made so as to give the court opportunity for correction, and that an exception which does not do so raises no question for review. See, e. g., *Holder* v. *United States,* 150 U. S. 91, 92; *Burns* v. *United States,* 274 U. S. 328, 336; *Du Vall* v. *United States,* 82 F. 2d 382, 383–384 (C. C. A. 9), certiorari denied, 298 U. S. 667. Certainly there is even more reason to follow this principle where, as here, the claimed error exists only by a distorted reading of the charge.

3. Petitioners claim that Section 3 (c) (1) of the Federal Alcohol Administration Act and the regulation thereunder defining "resale at wholesale" are invalidly vague, indefinite, and uncertain, in that they fail to forewarn sellers of the conduct for which they will be criminally liable. They cite *M. Kraus & Bros., Inc.* v. *United States,* No. 198,

decided by this Court March 25, 1946. The statute and regulation here involved are, however, far different from those in the *Kraus* case and are well within the requirements of that decision. Read together, they are specific and unambiguous; a liquor dealer cannot purchase for resale to trade buyers, a well understood class of persons, without a basic permit. Whether a person is a trade buyer is an ascertainable fact, and the mere possibility that in isolated instances the exercise of reasonable diligence to ascertain this fact may not be availing does not excuse the seller who deliberately refrains from a proper inquiry. The rule of strict construction of penal statutes does not require that a statute "be strained and distorted in order to exclude conduct clearly intended to be within its scope." *United States* v. *Raynor*, 302 U. S. 540, 552. The seller is not, therefore, as petitioners argue, in a hazardous position under the Act and regulation. The situation here is analogous to that arising under various state laws prohibiting certain businesses from serving or employing minors. In such instances it is generally held that, even where intent is essential to guilt under the particular statute, the offense is complete if the business operator should have known by the exercise of reasonable diligence that the customer or employee was a minor. See, *e. g.*, *Stern* v. *State*, 53 Ga. 229; *Justice* v. *Commonwealth*, 213 Ky. 617, 281 S. W. 803; *Overland Cotton Mill*

v. *People,* 32 Colo. 263, 75 P. 924; *Siegel* v. *People,* 106 Ill. 89.

4. Petitioners contend that Section 3 (c) (1) of the Act was not intended to apply to a business such as theirs, the operations of which are solely intrastate in character, and that to construe it as applying to them raises serious questions of constitutional power under the commerce clause (Pet. 24). The first contention is negated by both the stated purposes and the design of Section 3 (*infra,* pp. 19–20). Subsections (a), (b) (2), and (c) (2) in terms apply only to interstate or foreign commerce in distilled spirits. Subsections (b) (1) and (c) (1), the latter being that which petitioners are charged with violating, contain no such express limitations; and the contrasting language of these two groups of subsections obviously precludes any implication that the activities proscribed by the latter group are limited to transactions in interstate or foreign commerce. Petitioners' argument ignores the unequivocal language of the statute; and "where the words are plain there is no room for construction." *Osaka Shosen Line* v. *United States,* 300 U. S. 98, 101. Nor is there any question of the constitutionality of this subsection of the Act as so applied to intrastate business, since, as the introductory lines of the section expressly state, it was enacted not only effectively to regulate interstate and foreign commerce and to enforce

the twenty-first amendment, but also "to protect the revenue." Comparable regulatory measures, applicable without regard to whether the regulated activities are interstate or intrastate in character, have been upheld where, as here, they implement and bear a reasonable relation to the exercise of the taxing power. See *United States* v. *Doremus,* 249 U. S. 86.

CONCLUSION

The decision below is correct and no real conflict of decisions or important question is involved. We therefore respectfully submit that the petition for a writ of certiorari should be denied.

J. HOWARD MCGRATH,
Solicitor General.
THERON L. CAUDLE,
Assistant Attorney General.
ROBERT S. ERDAHL,
SHELDON E. BERNSTEIN,
Attorneys.

MAY 1946.

APPENDIX

The Federal Alcohol Administration Act of August 29, 1935, 49 Stat. 977, as amended by the Act of February 29, 1936, 49 Stat. 1152, provides in pertinent part:

SEC. 3 (27 U. S. C. 203):

In order effectively to regulate interstate and foreign commerce in distilled spirits, wine, and malt beverages, to enforce the twenty-first amendment, and to protect the revenue and enforce the postal laws with respect to distilled spirits, wine, and malt beverages:

(a) It shall be unlawful, except pursuant to a basic permit issued under this Act by the Secretary of the Treasury—

(1) To engage in the business of importing into the United States distilled spirits, wine, or malt beverages; or

(2) for any person so engaged to sell, offer or deliver for sale, contract to sell, or ship, in interstate or foreign commerce, directly or indirectly or through an affiliate, distilled spirits, wine, or malt beverages so imported.

(b) It shall be unlawful, except pursuant to a basic permit issued under this Act by the Secretary of the Treasury—

(1) to engage in the business of distilling distilled spirits, producing wine, rectifying or blending distilled spirits or wine, or bottling, or warehousing and bottling, distilled spirits; or

(2) for any person so engaged to sell, offer or deliver for sale, contract to sell,

or ship, in interstate or foreign commerce, directly or indirectly or through an affiliate, distilled spirits or wine so distilled, produced, rectified, blended, or bottled, or warehoused and bottled.

(c) It shall be unlawful, except pursuant to a basic permit issued under this Act by the Secretary of the Treasury—

(1) to engage in the business of purchasing for resale at wholesale distilled spirits, wine, or malt beverages; or

(2) for any person so engaged to receive or to sell, offer or deliver for sale, contract to sell, or ship, in interstate or foreign commerce, directly or indirectly or through an affiliate, distilled spirits, wine, or malt beverages so purchased.

Sec. 7 (27 U. S. C. 207):

* * * Any person violating any of the provisions of sections 3 or 5 shall be guilty of a misdemeanor and upon conviction thereof be fined not more than $1,000 for each offense. * * *

The regulations promulgated under the Federal Alcohol Administration Act, provide in pertinent part (27 C. F. R. 1.1 (g)):

"Resale at wholesale" shall mean a sale to any trade buyer.

Section 3250 (a) of the Internal Revenue Code provides:

(3) *Retailers selling at wholesale.*

Except as provided in section 3254 (c) (2), a qualified retail dealer in liquors may not sell distilled spirits, wines, or malt liquors in quantities of five wine-gallons or more to the same person at the same time without incurring liability to special tax as a wholesale dealer in liquors.

U. S. GOVERNMENT PRINTING OFFICE: 1948

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1945.

No. 1068.

MEYER EASTMAN, Alias "MEYER ESSTMAN",
and DAVE MARGLOUS,
Petitioners,

vs.

UNITED STATES OF AMERICA,
Respondent.

PETITIONERS' REPLY BRIEF.

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INDEX.

Cases Cited.

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PETITIONERS' REPLY BRIEF.

For the purpose of aiding the Court in its consideration of their petition, petitioners deem it important to point out certain misstatements of essential facts in the Government's brief. These misstatements, though inadvertent, may have a tendency to mislead the Court.

1. The Government states (Govt. Brief, pp. 6-7) that "contrary to petitioners' claim that 'there was no evidence offered by the Government to show the fact that, or the time when, petitioners purchased any distilled spirits at their store for any purpose,' reports filed by petitioners with the Alcohol Tax Unit showed as to six of the eleven

large sales . . . that petitioners had purchased and received the liquor involved on the same day or but a few days prior to resale by them." In support of this statement, the Government's brief, footnote 8, p. 7, contains a table (which is not a part of the record) purporting to set out the alleged "purchases" and sales as taken from petitioners' reports.

The Government makes the same statement in another form on p. 8 of its brief, claiming that "the Government introduced unequivocal evidence—reports made to the Treasury Department by petitioners themselves—showing that in at least six instances petitioners had purchased liquor later illegally sold at wholesale, and, moreover, that these purchases were consummated on the same, or a few days immediately preceding, the days on which the illegal resales were made."

The foregoing statements are wholly untrue. On the other hand, petitioners' statement of the facts is supported by the record; and petitioners submit that the reports relied on by the Government constitute no evidence whatever of purchases.

The following explanation of the nature and purpose of the reports in question may be helpful.

Every liquor dealer who makes sales in quantities of more than 5 wine gallons at any one time must file and make detailed reports of receipts and disposition of liquor. Form 52A is the report of liquor receipts and Form 52B is the report of disposition. The form of such reports is prescribed by the regulations, and no dealer has the right to alter or change the printed language thereof. The same form is required whether the dealer is a retailer who makes occasional quantity sales, or a true wholesaler.

Retail liquor stores such as the Peoples Liquor Store do not maintain "wholesale" inventories, i. e., a separate stock of liquor used for multiple case lot sales. All liquor

purchased by such stores is purchased for regular retail purposes and placed in the regular retail stock. Occasionally, in the ordinary course of their retail business an order is taken for a quantity of liquor in excess of five wine gallons. The dealer is required to make a report of the disposition of such liquor on Form 52B. However, he cannot legally dispose of the liquor until he has "received" it and made an entry of its receipt on Form 52A. For this purpose, the dealer withdraws the quantity sold from his retail stock and transfers it to himself in his capacity as a "wholesale" liquor dealer. By such method (permissible under the regulations) the amount of liquor required to consummate the sale (which the dealer may have purchased or otherwise acquired long before) is "transferred" from the "retail" stock and "received" (not purchased) by the so-called "wholesale" department. It is, of course, wholesale only in the sense that it involves a disposition at one time of more than five wine gallons.

The reports on Form 52A do not constitute any evidence as to when the liquor was purchased. They are reports of the technical "receipt" of the liquor by the dealer in one capacity from himself in another. They are not reports either of purchases on the dates set forth therein or of the actual receipt of the liquor by the dealer from a wholesaler or distributor. In fact, the identical reports would have been made (and required by the regulations) whether the liquor was purchased by the dealer on the same day, one year, or five years before the transfer and "receipt," or even if the liquor had been received by gift or bequest.

The regulations do not require the dealer to report when he makes a purchase of liquor or the quantity purchased by him. He is required to show on Form 52A only the date he technically "receives" any liquor in his capacity as a holder of a wholesale tax stamp (and the amount and description thereof), irrespective of the date he may have

purchased and received such liquor in connection with his retail business. The entry made on Form 52A is made only when the dealer transfers the liquor from his retail stock to his "wholesale" department, because until then such liquor, although it may have been purchased and in his actual possession many years before, has not been "received" by him as a "wholesaler."

Obviously, there is a coincidence in time between the "receipt" and the sale by the dealer, since the very purpose of transferring the liquor from the retail stock and "receiving" it within the meaning of the regulations is to consummate a sale. There is no reason for a retail dealer to "receive" any liquor as a "wholesaler" (i. e., take it out of his retail stock) until he has an order to fill.

The reports relied on by the Government (Government Ex. 3, R. 73; Government Ex. 4, R. 81) show on their face that the liquor described was received by the Peoples Liquor Store from the Peoples Liquor Store—the petitioners themselves. The Government does not explain how petitioners could have purchased the liquor from themselves, nor the basis on which it is contended that such reports constitute "unequivocal" evidence of the time any purchases may have been made by petitioners for any purpose.

Petitioners submit that none of the reports to the Treasury Department contain any evidence of the date the liquor "received" was purchased. The Government does not contend there is any other evidence on that point. Hence, there is an entire failure to prove both the fact that petitioners made purchases of liquor within the limitation period, and the purpose and intent with which any such purchases were made. Unless there is proof of such purchases, a conviction cannot be sustained. It must be borne in mind that the Act is directed against the business of **purchasing** distilled spirits for the purpose of reselling the liquor to trade buyers.

2. The Government's brief reiterates the statement that petitioners made "illegal" resales of liquor at wholesale (Govt. Brief p. 8). This statement is very unfair, since every sale made by petitioners or their clerks was legal and in strict accordance with the law. The Government overlooks the fact that the wholesale tax stamp authorized petitioners to make sales in any quantity.

A sale to a trade buyer is not per se illegal. The Alcohol Administration Act does not prohibit a retail liquor dealer from making sales in intrastate commerce even to trade buyers. When the Government argues to the contrary it misconceives the law. What the Act does prohibit is engaging in the business of **purchasing** liquor for the purpose of selling to trade buyers, i. e., the business of acquiring liquor for distribution to dealers. Obviously, the Act has reference to true wholesalers, with respect to whom there can be no question that they initially acquire distilled spirits in the course of their regular business for disposition to other dealers. The only sales declared illegal by the express provisions of the Act are those made in interstate or foreign commerce, and then only when made by persons engaged in the business of purchasing for resale at wholesale.[1]

Every sale made by petitioners or their clerks was wholly intrastate in character and the purchasers took possession of the liquor on petitioners' premises. Moreover, there was only **one** isolated sale made to a trade buyer, that being the sale by a clerk of twelve cases to

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[1] Section 203 (c) (2) provides, inter alia: "It shall be unlawful, except pursuant to a basic permit . . . (2) for any person so engaged to . . . sell . . . in interstate or foreign commerce . . . distilled spirits . . . so purchased."

For the information of the Court, petitioners have set out in the Appendix forms prescribed by the Treasury Department of the application for a basic permit and the basic permit itself. The Government derives no revenue from the permits and no fee or excise is charged or levied therefor. The basic permit shows on its face its inapplicability to retail liquor dealers doing an exclusively intrastate business.

Fannie Gladdish.[2] Petitioners, of course, neither knew nor had reason to believe she was a dealer or was buying for resale, and the sale was properly recorded in the regular course of business. There is no record basis whatever for the Government's charges (Govt. Brief p. 8) that petitioners made at least six "illegal" sales.

3. Certainly, under the Act it was incumbent upon the Government to prove at last two basic facts: (1) that petitioners engaged in the business of purchasing liquor and (2) that such purchases were made for the purpose and with the intent of reselling such liquor to trade buyers.

The necessity for showing such intent is inherent in the statutory language. If the Act means what it says, the determinative factor must be the intent with which the petitioners made the purchases. The Government raises a false issue when it suggests (Govt. Brief p. 11) that the issue as to intent might have been resolved on the theory that the act is malum prohibitum. Such argument might be proper only if the Act specifically prohibited sales to trade buyers. What the statute does prohibit is engaging in the business of purchasing liquor for resale at wholesale, which necessarily involves the intent with which the liquor was purchased. There is no evidence whatever from which a jury could properly find without resort to speculation and conjecture that petitioners purchased any liquor with the intention of selling the same to trade buyers.

Petitioners concede that ordinarily direct evidence of the intention of a retail liquor dealer to sell his liquor for other than retail purposes is difficult to procure. Petitioners further concede that such intention may be proved by circumstantial evidence. Such concessions, however, are in no way decisive of the case, because there are no circum-

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2 Carlisle testified only that he was a dealer at the time of the trial (18 months after the sale). It is absurd to contend, as does the Government, that the jury could infer—speculate is a better word—that he "meant" he operated a tavern when the sale was made (Govt. Brief, p. 6, footnote 5).

stances in evidence from which an intent to sell to trade buyers may reasonably be inferred, unless it be held, as did the Circuit Court of Appeals, that such intent may be inferred from the fact that sales were made in quantities "in excess of normal individual consumption requirements," although such quantity sales are in themselves legal.

The situation would be entirely different had the Government offered any evidence that a purchaser informed petitioners when a sale was made that he was a trade buyer, or if the petitioners had learned such fact through other sources of information. In such circumstances actual knowledge of the occupation of the purchaser and a sale with such knowledge would afford a reasonable basis for inferring that the liquor sold under such circumstances had been purchased initially by petitioners for resale to trade buyers.

4. The Government does not argue that petitioners had knowledge of the occupation or purpose of any customer or that such knowledge was brought home to their clerks. Although conceding that the quantities of liquor sold were not the sole factor, the Government argues that such sales in quantities "in excess of normal individual consumption requirements" placed petitioners on notice that the purchasers might be buying for resale and this possibility imposed a duty on petitioners to ascertain the actual purpose of the purchase.[1]

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[1] The unfairness of the Government's position is evidenced by an incident concerning which some testimony was given. An inspector for the Alcohol Tax Unit was on petitioners' premises when a large quantity of liquor was being removed by the purchaser from the petitioners' premises onto a truck (R. 142-144). The inspector did not make any inquiry as to the name of the purchaser or the business in which he was engaged, nor did this inspector advise petitioners or their employees that it was their duty to obtain this information. He was concerned only with whether the sale was properly recorded on the Government form. If the quantity did not make the inspector suspicious, how can it reasonably be said that petitioners should have been? The first inkling petitioners had that the Government felt that an investigation was required was March of the year following the date of the sales, at which time an Alcohol Tax Unit investigator asked Mr. Esstman what steps he took to determine who his customers were (R. 125).

The Government has therefore, read into the statute a duty, the violation of which constitutes a crime, although such duty is not contained in the language of the statute or any regulations promulgated thereunder. If there is an obligation on the part of a liquor dealer to conduct an affirmative investigation as to the identity and purpose of a purchaser, he should be apprised of such duty in express terms, in advance, so that he may be in a position to take appropriate action. U. S. v. Durst, 59 F. Supp. 891, l. c. 893.

The Government charges that petitioners "evidenced complete and irresponsible indifference to whether their customers were trade buyers"[2] (Gov't Brief, p. 12), and that this "indifference" to the implied duty to investigate marks their conduct as willful. The failure to investigate is not the equivalent of shutting one's eyes to the nature of the business carried on by one's customers. The fact that petitioners did not make an investigation does not characterize their conduct as willful unless they knew or had reason to believe that the duty to make such investigation was imposed upon them by law. There is an entire want of evidence showing bad faith on the part of petitioners.

The Government's argument assumes that an investigation would have ascertained that the purchasers were trade buyers, although the record does not so show, and it is pure speculation to assume that such is the fact. Even as to the one person later proved to be a trade buyer at

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[2] This alleged "irresponsible indifference" is not based on any substantial evidence. As proof thereof, the Government cites testimony of a conversation between a Government inspector and petitioner Esstman (R. 125) the following year. At that time Esstman said "I am no detective" when asked what steps he took to determine whether his customers were in the liquor business. This is an equivocal statement. It means no more than that he had neither the training nor the facilities for making an investigation. As to petitioner Marglous there was not a scintilla of evidence. Inasmuch as neither petitioner had been notified an investigation was necessary, the failure to make one—particularly in the absence of suspicious circumstances—cannot fairly be said to evidence "complete and irresponsible indifference."

the time of purchase, the sale was of a relatively small quantity (12 cases). With respect to that sale there was no evidence showing that petitioners could have ascertained her occupation other than by an investigation off the premises, nor was there any evidence of any suspicious circumstances in connection with the sale which might have indicated that the purchaser was a trade buyer. If criminal intent may be inferred from failure to affirmatively investigate, then the conviction may be sustained even though there is no evidence whatever as to the actual occupation of any purchaser. Petitioners submit that this case is clearly one based upon suspicion, surmise and conjecture.

If the Government's argument is sound, it means that every retail dealer who makes any sale in excess of five wine gallons at any one time is bound, by reason alone of the quantity sold, to refuse to complete the sale until a careful investigation is made of the identity, occupation and purpose of the purchaser. As to retail dealers who consummate sales on their premises such a requirement is unreasonable, particularly in view of the fact that many purchasers are residents of other cities. It is further unreasonable because the extent of such investigation is not set forth in any regulation, nor for that matter is there any requirement by statute or regulation for an investigation of any nature.

The construction of the Act sought by the Government and sustained by the Circuit Court of Appeals is strained, unreasonable and impractical. There is an urgent necessity that this Court review the instant case for the purpose of correcting a manifest injustice and authoritatively construing the Act, so that retail liquor dealers may know in advance what course of conduct is illegal.

Petitioners submit that if there is a duty to use diligence to ascertain the identity, occupation and purpose of

every customer who purchases a quantity of liquor in excess of "normal individual consumption requirements," such a duty ought not be implied, but should be expressly set forth in the law or the regulations promulgated thereunder. It is seldom that a statute is so poorly implemented by regulation as the section involved in this case.

5. The Government wholly fails to comprehend the contentions of petitioners relating to the prejudicially misleading and inadequate nature of the charge to the jury. The fact that the trial court instructed the jury on the burden of proof, reasonable doubt and other cautionary matters in no way obviated the necessity for giving a clear and unambiguous instruction on the facts necessary to be found in order to convict under the Act. Whether or not the Court's instructions were otherwise correct, the fact remains that the only instruction the trial court gave on substantive matters is the terse and erroneous statement of the "issue boiled down." Petitioners' contention is not predicated upon isolated or piecemeal consideration of the court's instructions.

The Government argues that the entire charge gave the jury an accurate statement of the applicable law (Govt.'s Brief, p. 14). However, eliminating the cautionary instructions which do not in any way concern the facts of the case, the instructions do not furnish any guide whatever with respect to the relevant legal criteria. Petitioners submit that not even a lawyer, much less a layman, could read the instruction relating to the substance of the offense and understand the true issues involved, and be enabled to sift the evidence to determine those issues.

Nowhere does the trial court tell the jury that defendants cannot be found guilty unless they find that liquor was purchased by the defendants for the purpose and with the intention of selling the same thereafter to retail liquor

dealers. Nowhere is it stated that the jury must find that defendants could not be found to have acted willfully unless they intentionally sold liquor to persons known by them or their clerks at the time to be liquor dealers. In fact, the Court does not require the jury to find that any specific act of appellants was willfully done. Nowhere is any path charted for the jury. Willfulness and intent is not required to be found. To inform the jury, as the Court does, in effect, that the only issue for them to determine is simply whether the defendants sold liquor at wholesale for resale purposes, is to completely omit the essential ingredients of the offense, including the elements of purchases, willfulness, the knowledge and intent of the seller that the liquor is to be resold, and the knowledge by the seller that the purchaser is in fact a retail liquor dealer, and intends to resell the liquor purchased. The purpose of the buyer in making the purchase is not material unless it is actually known to the seller, because unless there is such knowledge there is no room for an inference that the liquor was purchased by appellants for such purpose. Nevertheless this instruction permits a finding of guilt to be based upon the purpose of the buyer rather than upon the purpose and intent of the appellants. It will be noted that the Court defined the statutory language as meaning "the purchasing for resale at wholesale to purchasers who make the purchase for the purpose of selling intoxicating liquors" (R. 265-266). Thus the knowledge and purpose of the seller is made immaterial and willfulness is not required.

The Government's argument, both with respect to the sufficiency of the instruction and the generality of the exception to the charge, is well answered by the decision of this Court in Screws v. U. S., 325 U. S. 91. In that case this Court ruled as follows:

> "It is true that no exception was taken to the trial court's charge. Normally we would under those circumstances not take note of the error. See Johnson v. United States, 318 U. S. 189, 200, 87 L. ed. 704, 713, 63 S. Ct. 549. But there are exceptions to that rule. United States v. Atkinson, 297 U. S. 157, 160, 80 L. ed. 555, 557, 56 S. Ct. 391; Clyatt v. United States, 197 U. S. 207, 221, 222, 49 L. ed. 726, 731, 732, 25 S. Ct. 429. And where the error is so fundamental as not to submit to the jury the essential ingredients of the only offense on which the conviction could rest, we think it is necessary to take note of it on our own motion. Even those guilty of the most heinous offenses are entitled to a fair trial. Whatever the degree of guilt, those charged with a Federal crime are entitled to be tried by the standards of guilt which Congress has prescribed."

The **Screws** case is particularly in point on this question, in that it not only states the rule applicable where no exception is taken to the instruction, but also holds that the issue of willfulness must be submitted to the jury under appropriate instructions, and that in determining such issue the jury is entitled to consider all of the attendant circumstances. The instruction in the instant case is therefore erroneous because it did not submit the element of willfulness or require the jury to consider the attendant circumstances in determining whether appellants acted willfully.

These principles are again confirmed in M. Kraus & Bros. v. U. S., 66 S. Ct. 705, 710; U. S. v. Levy, 153 F. (2) 995, 998, and Williams v. U. S., 131 F. (2d) 21, 22-23.

In view of the evidence in the case, it was the Court's duty, by a fair and thorough instruction, to clearly charge the jury as to all of the necessary facts going to make up the offense denounced by the statute as criminal, so that the jury would be distinctly called upon to decide

from such evidence whether or not the defendants were engaged in the business of purchasing distilled spirits at wholesale, and whether or not, while so engaged, they disposed of the same to retail liquor dealers in violation of the statute.

All through the trial of the case, petitioners' counsel was insisting upon the necessity of a showing by the Government that petitioners intended to sell to liquor dealers, that petitioners or their clerks knew that purchasers were liquor dealers and that their conduct was willful. The Court was fully aware of what facts counsel deemed necessary to support a conviction. The instruction requested by them (R. 253), irrespective of any technical inaccuracy, sufficiently called the Court's attention to the law of the case.

In Hargrove v. United States, 67 F. (2nd) 820, l. c. 822, 823, the Court stated: "Defendants' requested charge contains some inaccuracies, some inadvertence. It, however, sufficiently called the Court's attention to the law of the case; the refusal to charge its substance was error."

In the appellate court the convictions of petitioners were sustained on the basis of inferences from quantity sales, failure to investigate and "indifference" to an implied duty. Yet none of these matters were submitted to the jury. How could the jury properly pass judgment on the issues of the case when they were not even told the elements of the offense broken down in such a way as to definitely aid them? That they did not understand the case from this instruction is evidenced by their conviction of defendant Hendin as to whom there was not a scintilla of evidence and whose conviction was reversed by the Circuit Court of Appeals.

Petitioners respectfully submit that the charge to the jury was prejudicially erroneous. The generality of the exception should not be a ground for refusing to consider

the error. Technical considerations relating to exceptions should not be of greater importance than the right of a defendant to a fair trial before a jury adequately instructed on the elements of the offense.

CONCLUSION.

The petitioners have been unjustly convicted of a crime, although their conduct was in accordance with law. As set forth in their petition and supporting brief, it is of great public importance that this court authoritatively construe the Federal Alcohol Administration Act in order that retail liquor dealers may conduct their businesses in accordance therewith. The importance of the questions and the conflict of decisions warrants the issuance of the writ of certiorari.

Respectfully submitted,

LOUIS B. SHER,
Attorney for Petitioners.

Joseph Nessenfeld,
Maurice L. Mushlin,
Of Counsel.

APPENDIX.

Form 1632
Treasury Department
Internal Revenue Service
(Rev. January 1941)

Application for Wholesaler's Basic Permit Under the Federal Alcohol Administration Act.

To District Supervisor,
.....District,
.....

The undersigned.....
.....
with principal office at.....
.....
hereby makes application for a basic permit to engage in the business of purchasing for resale at wholesale the following classes of alcoholic beverages:
.....
(Specify whether distilled spirits, wine, or malt beverages)
and in receiving, selling, and shipping, in interstate and foreign commerce, the alcoholic beverages so purchased.

The applicant agrees that he will operate in conformity with the Federal Alcohol Administration Act and amendments thereto; the Twenty-first Amendment and laws relating to the enforcement thereof; with all other laws of the United States relating to distilled spirits, wine, and malt beverages, including taxes with respect thereto; and all applicable regulations made pursuant to law which are now, or may hereafter be, in force; and the laws of all States in which he engages in business.

All data, written statements, affidavits, evidence, or other documents submitted in support hereof, or upon hearing hereon, shall be deemed to be a part of this application.

.....
.....

Subscribed and sworn to before me this.....day of.....

.....

Form 1633
Treasury Department
Internal Revenue Service
July 1940

Permit.....

Wholesaler's Basic Permit.

(Under the Federal Alcohol Administration Act and Regulations)

.....

.....

Pursuant to application dated....., you are hereby authorized and permitted to engage, at the above address and at branch offices and other places of business, in the business of purchasing for resale at wholesale....., and, while so engaged, to sell, offer and deliver for sale, contract to sell and ship, in interstate and foreign commerce, the alcoholic beverages so purchased.

This permit is conditioned upon compliance by you with sections 5 and 6 of the Federal Alcohol Administration Act and all other provisions thereof; the Twenty-first Amendment and laws relating to the enforcement thereof; all laws of the United States relating to distilled spirits, wine, and malt beverages, including taxes with respect thereto; all applicable regulations made pursuant to law which are now, or may hereafter be, in force; and the laws of all States in which you engage in business.

This basic permit is effective from the date hereof and will remain in force until suspended, revoked, annulled, voluntarily surrendered, or automatically terminated, as provided by law and regulations.

This permit is not transferable.

.....
District Supervisor

Dated.....